

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Orig w/ affidavit of mailing

76-1229

To be argued by
RICHARD APPLEBY

*B
PJS*

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1229

UNITED STATES OF AMERICA,

Appellee,

—against—

GAYLORD ANGUISH,

Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN SCHALL,
RICHARD APPLEBY,
*Assistant United States Attorney
Of Counsel.*

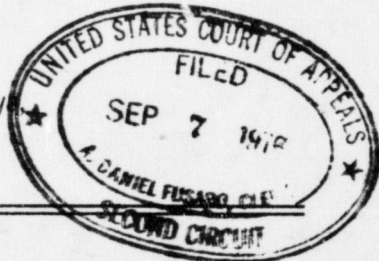


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1-2
Statement of the Case	2
Procedural Background Relating to Appellant's Competency to Stand Trial	2-4
The Trial	4-6
ARGUMENT:	
Appellant was not denied due process or the right to assistance of counsel	6-10
CONCLUSION	11

TABLE OF CASES

<i>Dusky v. United States</i> , 362 U.S. 402 (1960)	2, 7
<i>United States ex rel. Parson v. Anderson</i> , 354 F. Supp. 106 (D. Del. 1972)	9
<i>United States ex rel. Parson v. Anderson</i> , 481 F.2d 94 (3rd Cir. 1973)	9
<i>United States v. Freeman</i> , 357 F.2d 606 (2d Cir. 1966)	4, 6
<i>United States v. Knohl</i> , 379 F.2d 427 (2d Cir. 1967)	7
<i>United States v. Sullivan</i> , 406 F.2d 180 (2d Cir. 1969)	7
<i>Wilson v. United States</i> , 391 F.2d 460 (D.C. Cir. 1968)	10

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Preliminary Statement

This is an appeal from a judgment of conviction entered on May 6, 1976, by the United States District Court for the Eastern District of New York (Neaher, J.) following a jury trial convicting appellant, Gaylord Anguish, of the armed robbery on July 2, 1974, of the Bankers Trust of Suffolk, 1174 Jericho Turnpike, Commack, New York, in violation of Title 18, United States Code, Sections 2113(a) and (d). Appellant received a ten year term of imprisonment on Count 2 (the "d" count) of indictment No. 75 Cr. 50 and is presently serving his sentence.¹

¹ At sentencing appellant pled guilty to Count 2 ("d" count) on each of four other indictments (75 Cr. 48, 75 Cr. 49, 75 Cr. 51 and 75 Cr. 52), charging him with the armed robberies of four separate banks. Judge Neaher sentenced appellant to 10 years imprisonment on each of these indictments to run concurrently with the imprisonment imposed under indictment No. 75 Cr. 50.

The sole issue raised on this appeal is whether appellant's alleged amnesia as to the events surrounding the bank robbery rendered him incompetent to stand trial.

Statement of the Case

Procedural Background Relating to Appellant's Competency to Stand Trial

On January 31, 1975, appellant pled guilty to Count Two of Indictment 75 Cr. 50. Subsequent to the plea psychiatric reports submitted by the defense for the purpose of sentencing raised questions as to appellant's competency.² Consequently, on May 22, 1975, Judge Neaher sent appellant to the Springfield Medical Center for a determination as to his competency under the standard enunciated in *Dusky v. United States*, 362 U.S. 402 (1969). On July 30, 1975 the staff at Springfield found appellant competent to stand trial (Appellant's App., p. 11). After present counsel was appointed on September 10, 1975, appellant moved to withdraw his guilty plea on September 30, 1975 (Appellant's App., p. 12).

On October 10, 1975 appellant claimed for the first time total retrograde amnesia concerning the Bankers Trust robbery as well as the other four bank robberies.

² Dr. Richard Kohl of the Payne-Whitney Psychiatric Clinic found appellant to be "depressed with a possible thinking disorder." He stated that the defendant "is aware of his wrongful acts and the consequent punishment which is clearly stated by law." Dr. Lawrence Bloom, a private practitioner, found "the criminal episodes to have been committed in a state of psychotic depression." Dr. Naomi Goldstein of the Metropolitan Correctional Center found appellant to be not "overtly psychotic" and laboring under a "mild thinking disorder." (Appellant's App., p. 10).

The claim of amnesia triggered a new round of psychiatric evaluations.³

On January 12, 1976 Judge Neaher held a day-long evidentiary hearing to determine whether appellant's plea should be vacated and, if so, whether appellant was competent to proceed to trial. At the hearing Drs. Daniel Schwartz, Naomi Goldstein, Robert W. Collier, Harold Fain and Jack Eardley, all psychiatrists, testified as to appellant's competency to stand trial as well as the genuineness or lack thereof of his alleged amnesia. The psychiatrists were unanimous that appellant was competent to proceed to trial under the *Dusky* test (Appellant's App., p. 15). The psychiatrists were not in agreement on the genuineness of appellant's alleged amnesia.⁴ Appellant also took the stand at the hearing, claiming total amnesia for the period December 1965 through October 1975 (Transcript of hearing of January 12, 1976 at pages 29-49). Thus, appellant asserted that he had no recollection of pleading guilty on January 31, 1975 (Transcript of hearing of January 12, 1976 at p. 29).

³ In a report dated October 20, 1975, Dr. Daniel Schwartz concluded that appellant was apparently suffering from retrograde amnesia but found him to be competent under the *Dusky* test. Appellant was then again sent to Springfield for further examination in light of his claim of amnesia. In a report dated December 3, 1975 the staff once again found appellant to be competent and further concluded that his amnesia was feigned (Appellant's App., p. 18).

⁴ Judge Neaher expressed doubts as to the bases for Drs. Goldstein's and Schwartz' opinions that appellant's amnesia was genuine. He stated:

"While Dr. Goldstein believed the amnesia to be genuine, she performed no tests and relied entirely on her clinical judgment. Dr. Daniel W. Schwartz, Director of Forensic Psychiatric Services of the Kings County Hospital Center—and a psychiatrist frequently utilized by the government—also found defendant suffering from a "retrograde amnesia" covering a five-year period. He, too, performed no tests and would not state his opinion with any degree of medical certainty." (Appellant's App., p. 18).

On February 10, 1976 Judge Neaher, in a nine page memorandum decision, (Appellant's App., pages 9-18), granted appellant's motion to withdraw his plea of guilty and further found him competent to stand trial. Judge Neaher stated: "Although the weight of psychiatric opinion was in favor of concluding that defendant's amnesia was more feigned than real, a resolution of this question is not essential to a determination of § 4244 competency" (Appellant's App., p. 16). Judge Neaher further found that since the commission of the bank robbery was conceded by the defense,⁵ and since the only issue for the jury to decide was appellant's criminal responsibility under the test adopted in *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966), appellant's alleged amnesia would not substantially impair his ability to defend himself" (Appellant's App., p. 16).

The Trial

The Government's case in chief consisted of two eyewitnesses who positively identified appellant as the bank robber, a bank surveillance photograph of appellant of excellent quality and a full confession made to agents of the Federal Bureau of Investigation (23-32; 61-69;

⁵ Defense counsel stated the following at a status report before Judge Neaher on October 29, 1975:

Mr. Corbett: I discussed this defense with him before he was taken with the amnesia attack and I had recommended to him the fact. So as far as we are concerned if we tried this case we will stipulate the bank robberies took place. This man was physically in these banks. Whatever banks there are. If there is one and this man physically did this and he was there, but our only defense is, as your Honor points out, a psychiatric defense and I realize it is a very difficult defense. But, if that is his defense I say he has a right to present it to the Court and Jury. (Transcript of proceedings of October 29, 1975 at p. 10-11).

122-128; Government Exhibit 3).⁶ Cross-examination of the witnesses was devoted primarily to laying the basis for the insanity defense (69-83; 32-58; 90-104).⁷

After the Government rested, the defense called Drs. Bloom and Naomi Goldstein, both of whom testified that, as a result of his psychological traumas, appellant could not conform his conduct to the requirements of the law (222; 305). Dr. Bloom, who interviewed appellant both before and after the onset of his alleged amnesia, testified that he observed a "dramatic change" in the later interview in that appellant had a "pervasive amnesia" concerning the events of the bank robbery (215). Dr. Goldstein, who also interviewed appellant both before and after the onset of his alleged amnesia (293-296), concluded that appellant had a genuine "hysterical amnesia" (295).

In rebuttal, the Government called Drs. Daniel Schwartz and Harold Fain, both of whom testified that appellant was not operating under any kind of compulsion during the bank robbery (331; 406). Dr. Fain testified that since appellant refused to take sodium amytol, a drug which would have unblocked the alleged amnesia, and since he was not frightened about the amnesia, he, Dr. Fain, concluded that the amnesia was not genuine (411-416). Dr. Schwartz testified that appellant's amnesia was "a somewhat convenient very narrow lack of memory" (366). Nevertheless, Dr. Schwartz testified that even assuming the amnesia was genuine, the amnesia would have no significance in determining whether appellant

⁶ Unless otherwise indicated, references in parenthesis are to the trial transcript.

⁷ Defense counsel told the jury in his opening that the defense was insanity and that psychiatric testimony would be offered (14-22).

was sane at the time of the robbery under the *Freeman*^{*} test since the amnesia developed after the robbery (358-359).

In his summation, defense counsel agreed with Dr. Schwartz: "Amnesia has nothing to do with the case" (523).

The jury convicted appellant after deliberating approximately forty-five minutes.

ARGUMENT

Appellant was not denied due process or the right to assistance of counsel.

Appellant argues that in the district court he was denied due process and the right to "effective assistance of counsel." He bases his argument on the contention that because of amnesia he had no recollection of events about which government witnesses testified and that he was unable to testify in his own behalf. In this connection, appellant further asserts that the trial court's ruling that he was competent to stand trial was clearly erroneous because it was based on the allegedly incorrect assumption that the defense conceded appellant's commission of the bank robbery. Consequently, as the argument goes, no proper inquiry was made concerning whether the alleged amnesia impaired appellant's ability to defend himself. We respectfully submit that appellant's claims are frivolous.

^{*} See, *United States v. Freeman*, 357 F.2d 606, (2d Cir. 1966): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."

To begin with, contrary to appellant's assertion, a proper inquiry was made as to appellant's competency to stand trial. On January 12, 1976 a day-long evidentiary hearing was held in connection with appellant's motion to vacate his guilty plea. At this hearing Drs. Schwartz, Goldstein, Collier, Fain and Eardley all testified concerning appellant's mental condition, including his alleged amnesia. As noted above the psychiatrists were unanimous in the view that appellant was competent to stand trial under the standard announced by the Supreme Court in *Dusky v. United States*, 362 U.S. 402 (1960). Further, Judge Neaher had the opportunity to observe appellant when he testified at the hearing.

On February 10, 1976, the trial court issued its nine page memorandum decision. Holding that appellant was competent to proceed, Judge Neaher made no express finding as to the genuineness, or lack thereof, of the amnesia. The trial court did state, however, that "the weight of psychiatric opinion was in favor of concluding that defendant's amnesia was more feigned than real." (Appellant's App., pp. 15-16). Indeed, it was not necessary for Judge Neaher to resolve this issue because even genuine amnesia as to the events of a crime does not *per se* establish a defendant's incompetence to stand trial. *United States v. Sullivan*, 406 F.2d 180, 185-186 (2d Cir. 1969); *United States v. Knohl*, 379 F.2d 427, 436 (2d Cir. 1967). Rather, the inquiry is whether, taking into account the amnesia, a defendant "has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, *supra*, 362 U.S. at 402.

Employing the *Dusky* test, Judge Neaher expressly found appellant to be competent (Appellant's App., p. 17). Appellant does not claim that this finding was erroneous.

In fact, he concedes he was competent under the *Dusky* test (Appellant's Br., p. 7). Accordingly, we submit that appellant's argument can easily be disposed of on the ground that Judge Neaheer's finding was, by concession, not clearly erroneous.

Although conceding the correctness of the trial court's determination under *Dusky*, appellant proceeds to argue, illogically, that there was not an adequate inquiry into his competency. As noted above, the claim is apparently based on the contention that the court allegedly incorrectly believed that appellant was not contesting the actual commission of the bank robbery. For this reason, appellant would argue, Judge Neaheer failed to correctly weigh the importance (in terms of appellant's defense) of the alleged amnesia in making the competency determination.

We are at a loss to see how appellant can claim that Judge Neaheer was incorrect in assuming that appellant intended to concede the commission of the bank robbery. As indicated in footnote 5 *ante*, prior to the hearing on the competency issue, counsel for appellant (also appellate counsel) specifically informed Judge Neaheer that the defense would stipulate at trial the fact of the bank robbery and that the only evidence to be introduced by the defense at trial would be psychiatric testimony to prove appellant's insanity. True to this promise, counsel (in his opening statement) informed the jury that the defense was insanity and that psychiatric testimony would be offered (14-22). Counsel made no claim that the defense would dispute that appellant committed the bank robbery. And, the cross-examination of witnesses who identified appellant in the bank centered not on attacking their identification of appellant but rather entirely on eliciting points which would be helpful in establishing the insanity defense (32-58, 69-83, 90-104). In addition the only evidence the defense offered at trial was for the purpose of proving the insanity claim.

Indeed, the strategy of conceding the commission of the robbery was well-conceived, for the Government's case in chief was nothing less than overwhelming. A bank surveillance photograph clearly depicted appellant robbing the bank. The eyewitnesses positively identified appellant as the robber, and appellant made a detailed confession to FBI agents describing the manner in which he committed the robbery.

While appellant's amnesia, assuming it was genuine, precluded⁹ from taking the stand in support of his insanity claim, he was not thereby prejudiced. The two defense psychiatrists and appellant's mother testified at length as to his personal life. Moreover, the psychiatrists testified as to statements made to them by appellant, at a time before the onset of his alleged amnesia, concerning both his life history and the events surrounding and the actual commission of the bank robbery (214-216; 293-298). Consequently, appellant was able to gain the benefit of "testifying" without being subject to cross-examination. Significantly, appellant does not state what he could have established if he had been able to take the stand.

Appellant's reliance on the dictum in *United States ex rel. Parson v. Anderson*, 481 F.2d 94 (3rd Cir. 1973), is wholly misplaced (Appellant's Br., p. 7-8).⁹ First, unlike here, the psychiatric testimony in *Anderson* was unanimous that appellant's amnesia was genuine. See lower court opinion: *United States ex rel. Parson v. Anderson*, 354 F. Supp. 1060, 1068 (D. Del. 1972). Sec-

⁹ ("Had the proof of Parson's commission of the crime been based on eyewitness testimony, or had the prosecution relied substantially on statements attributed to Parson, his amnesia might have significantly hindered the preparation and presentation of a rebuttal defense. No such evidence was presented here. Rather, the evidence was of a physical nature. Thus, it would appear that the amnesia did not meaningfully affect the availability of this type of defense." at p. 96).

ond, here there *was* physical evidence linking appellant to the robbery (i.e. the bank surveillance photograph). Third, as indicated above, the only defense available to appellant was insanity, as to which there was abundant testimony so that appellant's defense was not meaningfully affected.

Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968), also cited by appellant in support of his claim that the indictment should be dismissed, is similarly not on point. There the court remanded for detailed post-trial findings on the question as to whether the defendant's amnesia rendered him incompetent. In *Wilson* the Government conceded the genuineness of the defendant's amnesia which was caused by physical trauma. Furthermore, in *Wilson* the defendant's ability to recollect the events of the alleged crime was much more crucial than in the instant case because in that case there was a defense on the merits. Thus, the defendant's amnesia significantly hindered his ability to provide himself an alibi. Here, as indicated above, no alibi defense was feasible or was offered.

Finally, contrary to appellant's claim (Appellant's Br., p. 9) it is clear that in making the competency determination under *Dusky* the trial court did take into account appellant's amnesia. In reaching his decision, Judge Neaher confronted the issue directly and stated: "Rather, the specific inquiry is whether the amnesia substantially impairs the defendant's ability to defend himself" (Appellant's App., p. 8).

In this case, after a full hearing, appellant was found competent to stand trial. At that trial he raised the only defense apparently available to him: insanity. It is clear that he was unimpeded in making that defense. He can hardly claim that he was denied due process.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: Brooklyn, New York
September 3, 1976

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

ALVIN SCHALL,
RICHARD APPLEBY,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

----- EVELYN COHEN -----, being duly sworn, says that on the 7th-----
day of September, 1976, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR THE APPELLEE-----
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

John C. Corbett, Esq.

66 Court Street

Brooklyn, N.Y. 11201

Sworn to before me this
----- day of Sept., 1976

Carolyn M. Johnson
CAROLYN M. JOHNSON
NOTARY PUBLIC, State of New York
No. 41449298
Commission Expires March 30, 1977

Evelyn Cohen